IN THE
Supreme Court of the United States,

OCTOBER TERM, 1897.

RICHMOND AND ALLEGHANY RAILROAD COMPANY ET ALS., APPELLANT,

vs.

R. A. PATTERSON TOBACCO COMPANY, APPELLEE.

BRIEF FOR APPELLEE.

The only provision of the Virginia statute (Code 1887, sec. 1295,) which this court is now called upon to construe reads as follows:

"When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released from such liability by contract in writing signed by the owner or his agent."

Is this act a regulation of commerce in the sense intended by the Federal Constitution, Article I, Section 8, Clause 3,

and void because repugnant to that instrument, which vests in the Congress exclusive power to "regulate commerce with foreign nations and among the several States"?

The State court upheld the validity of said provision, and we submit that its decision was plainly right.

For an affirmance of the decree below we might rely with confidence solely upon the able opinion rendered by the Supreme Court of Appeals of Virginia, through its president, Judge Keith; but seeing that counsel for the appellant have gone outside the record for fresh ammunition in making their attack upon this opinion, we shall have to submit something by way of reply.

Much that is said by opposing counsel has never been denied. Indeed, the opinion of the lower court distinctly admits certain legal propositions which counsel for the appellant take considerable pains to support by the citation of numerous authorities. So we shall not concern ourselves about combatting the statement that "where the subject of a contract is the transportation of the articles of commerce from one State to another, the sole and exclusive power to prescribe its terms is vested by the Constitution in Congress," &c. The radical vice of the argument for the appellant consists in a confusion in the mind of counsel between the "*contract*" and the "*terms of the contract*," on one hand, and the *form or evidence of the contract*, on the other hand. Keeping this distinction clearly before us, we submit that every constitutional difficulty suggested against the statute in question vanishes into thin air.

The subjects upon which a State may legislate touching commerce are of three kinds, viz: (1.) Subjects that are in their nature local, such as dams, bridges, ferries and pilots. (2.) Subjects that are embraced in the police power of the State, such as relate to the safety, comfort and well-being of

society. (3.) Under its general powers of legislation, a State may enact laws that *incidentally* affect commerce, but not purposely or directly.

And it is obviously by virtue of this last power that the States have claimed and been accorded the right to prescribe certain rules governing bills of lading and the like.

In the case of *Sherlock* vs. *Alling*, 93 U. S., 99, Mr. Justice Field says at page 103:

"It is true that the commercial power conferred by the Constitution (on Congress) is without limitation. It authorizes legislation with respect to all the subjects of foreign and inter-state commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt with the instruments of that commerce. Whatever therefore Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. And it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water or engaged in commerce, foreign or inter-state, or in any other pursuit."

Now it cannot be pretended, in the case at bar, that the Virginia statute "is directed against commerce or any of its regulations." On the contrary, it relates solely to "the rights, duties and liabilities of citizens." It imposes no burden upon commerce, nor interferes in any way with its freedom. And as Congress has not undertaken to deal with this matter, the State has full power to act.

"In pursuance of their general authority over internal concerns, the States may pass laws incidentally affecting inter-state commerce, provided such laws do not discriminate against such commerce, and are not inconsistent with acts of Congress. This power of the States is absolutely essential to the existence of a proper measure of local self-government." 11 Am. and Eng. Enc. Law, p. 555–6.

Counsel for appellant contend that because bills of lading are an essential instrument of commerce, any State law whatever touching these contracts is necessarily a regulation of them (and consequently of commerce) in the consti. tutional sense, and therefore void under the commerce clause of our Federal Constitution.

This is simply begging the question. As was said by Mr. Justice Strong in the *State Tax on Railway Gross Receipts*, 82 U. S. 293:

"It is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution."

And in *Munn* vs. *Illinois*, 94 U. S. 135, this court referring to the case just cited, and considering the question of warehouses as necessary instruments of commerce, says:

"They are used as instruments by those engaged in State as well as those engaged in inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly until Congress acts in reference to their inter-state relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction."

Counsel for the appellant undertake to argue from a definition of the word "regulate," as found in the dictionaries, that the statute under examination is unconstitutional "because an admitted regulation of inter-state commerce." We submit that it is hardly necessary at this late day to consult a lexicon for the constitutional meaning of this term. This court has repeatedly given to it a judicial interpretation. "To regulate commerce is to prescribe rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammeled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited." (*Wilton* vs. *State of Missouri*, 92 U. S. 280–1.

In *Sherlock* vs. *Alling*, *supra*, this court even more explicitly defines the term in question. At page 102 Mr. Justice Field, referring to the decisions cited by counsel to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States, says:

"The legislation adjudged invalid (in these cases) *imposed a tax* upon some instrument or subject of commerce, or *exacted a license fee* from parties engaged in commercial pursuits or *created an impediment* to the free navigation of some public waters, or *prescribed conditions* in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases *the legislation condemned operated directly upon commerce*, either by way of *tax* upon its business, *license* upon its pursuit in particular channels, or *conditions* for carrying it on."

(See also *Gloucester Ferry Company* vs. *Pennsylvania*, 114 U. S. 203–4; *Kidd* vs. *Pearson*, 128 U. S. 23.)

In the case of *Postal Telegraph Company* vs. *Adams*, 155 U. S., 696, it is held that taxing the franchise or privilege of being a corporation, whether domestic or foreign, was

within the power of State legislation, notwithstanding the imposition of such taxes *incidentally* affected the occupation of the defendant company.

We submit that the statute is in no legal sense a burden upon or a regulation of commerce. That it does not conflict with any act of Congress and is not contrary to any intention of Congress to be presumed by its silence. That it is simply an amendment or enlargement of the local law, which is subject to be modified by the Legislature, and which simply regulates the relative rights and duties of carriers and persons doing business with them in this State. That if the law of this State does not govern that relation and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or it is held by implication to have supplied it; that the failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts the rule of the State law, which until displaced covers the subject; that while it is competent for Congress to prescribe specific regulations touching foreign and interstate commerce, which regulations would supersede all conflicting local law which even incidentally affects such commerce, yet until such action is taken by Congress, the State statute must prevail.

Smith vs. *Alabama*, 124 U. S. 465.
Telegraph Company vs. *Tyler*, 90 Va. 300.

In *Smith* vs. *Alabama*, the statute assailed was one requiring railroad engineers in the State to be examined and licensed by a board appointed for the purpose. The plaintiff in error was an engineer engaged in inter-state commerce, and failing to undergo the examination or procure his license from said board, he was committed to answer an indictment for that offense. The case came up on a writ of *habeas*

corpus to test the constitutionality of said statute and was argued with great ability by counsel for plaintiff in error, who made every point and cited all the decisions of the Supreme Court now relied on by the appellant here. He contended that no State has the power to pass a law affecting inter-state commerce where its regulations require a uniform rule, or where the subject is national and should admit of but one form or plan of regulation; that the transportation of passengers and freight from one State to another is inter-state commerce; that the plaintiff in error, while operating as an engineer engaged in the business of inter-state commerce is as much an instrument of such commerce as the locomotive or cars in which the merchandise or passengers are transported; that to subject him, under the facts of the case, to examination and license and the payment of a fee before he is allowed to engage in the business of inter-state commerce, is not regulation, local or limited, in its nature, but one of general application, and that if the State of Alabama could impose such a system of regulation upon inter-state commerce, then every State in the Union could likewise devise and impose an independent system in accordance with its own policy and requirement; it might so happen that each State would have a different system of laws prescribing the qualifications and competency of a locomotive engineer, who might thus be compelled to get forty different licenses and submit to forty different examinations.

This was a much stronger plea than counsel can urge in the case at bar, because here no such confusion or inconvenience arising from conflicting State statutes is possible, as we shall presently show.

But it was further argued that Congress had itself legislated upon the whole subject of inter-state commerce carried on by the railroads of this country; that no provision is made in the Federal statute for the examination and license of locomotive engineers engaged in inter-state commerce;

and that this court had held that the non-exercise of the power in respect to the regulation of commerce between the States is equivalent to a declaration that such commerce shall be free and untrammeled.

And yet this court, Mr. Justice Matthews delivering the opinion, rejected all these considerations and upheld the statute in question as being properly within the reserved power of the States to enact. At page 480 he says, "the provisions on the subject contained in the statute of Alabama under consideration are not regulations of inter-state commerce. *It is a misnomer to call them such.*" And again he says, "no objection to the statute, as *an impediment* to the free transaction of commerce among the States, can be found in any of its special provisions." (p. 480.)

In *Sherlock* vs. *Alling*, *supra*, Mr. Justice Field says, at page 103.

"General legislation of this kind, prescribing the liabilities and duties of a citizen of a State, without discrimination as to pursuit or calling, is not open to any valid objections because it may affect persons engaged in foreign or inter-state commeree. *Objection might, with equal propriety, be urged against legislaion prescribing the form in which contracts shall be authenticated, because applicable to the contracts of persons engaged in such commerce.*"

This language is singularly relevant to the statute under examination, which only undertakes to "*prescribe the form in which contracts shall be authenticated*," without attempting in any way to regulate what the contract shall be.

The Virginia statute was not passed without due consideration. It was first brought into our Code by the revisers of 1887. Prior to that time a common carrier's liability for safe transportation of merchandise was limited to its own road.

McConnell vs. *Norfolk and Western Railroad Company*, 86 Va., 248.

The rule was different in many other States where the English doctrine obtained, viz.: That the initial carrier was responsible throughout the entire route, whether over its own or connecting lines; and it was the purpose of our Legislature in adopting the new Code to substitute the English for the so-called American rule in this State. (See Judge Burks' address before the Virginia State Bar Association, Vol. IV. Reports, page 142.) Judge Burks shows, by his reference to 72 Am. Dec., 230, that the revisers had before them in considering this change the statutes of New York and Missouri touching the same subject. As appears in the brief of counsel for appellant, the Missouri statute having several times come before the highest court of that State for judicial construction, its validity has been sustained. A comparison of the two statutes will show that there is a marked difference between section 244 of the Revised Statutes of Missouri and section 1295 of the Code of Virginia. The former statute provides that the common carrier issuing a bill of lading for goods received shall in any event be liable for any loss, damage or injury to such property caused by its own negligence or that of any connecting carrier to which such property may be delivered. The Virginia statute, on the other hand, only provides that the initial carrier in such case *shall be deemed to assume an obligation* for safe carriage throughout the route, "*unless*, at the time of such acceptance, *said carrier be released* or exempted from such liability by contract in writing signed by the owner or his agent." Even if the Missouri statute could by fair construction be held to prescribe a "rule of liability," the Virginia statute is most clearly and unquestionably in its purpose and effect nothing more nor less than a "rule of evidence." The latter statute carefully obviates the very difficulties which have been suggested in connection with the Missouri law in question. We insist that the statute of Virginia leaves the parties perfectly free to make any agreement they may see fit touching their mutual rights and lia-

bilities; but if that agreement is not *evidenced in a certain way*, the carrier "shall be deemed to assume a obligation," &c.

3d Minor's Inst., page 258.
Pennsylvania Railway Company vs. *McCann*, 42 N. E. Rep., 768.

The question is, *What was the contract?* A bill of lading was originally nothing but a receipt for the goods, with the carrier's undertaking, either express or implied, to deliver them as directed. When conditions and stipulations are added affecting the shipper, it assumes the form of a contract *inter partes*, but is not such unless and until adopted by the party to be bound. The question recurs, has the consignor ever agreed to these stipulations? Ordinarily the acceptance of such a paper would be *prima facie* evidence of such agreement, though the shipper never read or had an opportunity of reading a word that was in it. Now, the Legislature, in its wisdom, says: The best evidence that the shipper entered into the release contract shall be his signature or that of his agent thereto, and in the absence of such signature, it *shall be presumed* that the initial carrier undertook to convey the property safely to its destination. If the consignor did make such release contract, he must be bound by it. The statute does not undertake to interfere with private contracts. But if he did not *execute the paper*, then the carrier shall be deemed to have assumed liability for the entire route. In other words, the burden of proof is shifted.

It cannot be denied that, independently of any statute, the courts had a right to hold, and did hold in many States, the initial carrier liable beyond the terminus of his own line. Can it be said, then, that the Legislature is powerless to enact a declaratory statute—that a judge can rightly pronounce that to be the law which, if enunciated by the law-making body, would be unconstitutional?

As was said by Judge Lewis in a recent case (*Telegraph Company* vs. *Tyler*, 90 Va. 300):

"That it would be competent, moreover, for the State to afford redress through her courts according to the common law for the negligent failure of a telegraph company to deliver a dispatch sent from another State is unquestionable; and if this may be done it is equally competent for the State to seek by legislation in advance to prevent such violation of duty. What the State may punish or afford redress for, when done, it may seek by proper precautions in advance to prevent."

See also *Nashville R. R. Co.* vs *Alabama*, 128 U. S., 96; *Smith* vs. *Alabama*, 124 U. S., 465.

Mr. Chief Justice Waite, in *Munn* vs *Illinois*, *supra*, says at page 134:

"A mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will, or even at the whim of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

In the case of *The Henry B. Hyde*, 82 Fed. Rep., 681, Judge De Haven expressly recognizes the right of a State to enact a statute in respect to the execution of bills of lading for inter-state commerce. At page 682 he uses this language:

"In my opinion, the rule which governs the point now under consideration is that a common carrier may, by special contract with the shipper, stipulate for a more limited liability than that which he assumes under the ordinary contract for the carriage of goods; and such special contract *in the absence of any statute to the contrary*, may be contained in the bill of lading signed by the

carrier alone, and the acceptance of such bill of lading by the shipper at the time of the delivery of his goods for shipment, in the absence of fraud on the part of the carrier, is sufficient to show the assent of the shipper to the terms set out in the bill of lading. * * * It follows from what has been said that the stipulations stamped upon the face of the bills of lading under which the goods of the libellants were shipped are to be treated as parts of such bills of lading, and binding upon the libellants, unless this case is governed by Section 2176 of the Civil Code of this State (California), which declares in substance that, with the exception of certain stipulations not involved here, the acceptance by the shipper of a bill of lading or written contract for carriage of his goods containing modifications of the general liability of the carrier *is not binding upon the shipper unless signed by him.*"

In this case goods had been shipped from the port of New York to the city of San Francisco, and being damaged *en route* a suit was brought in California for the loss sustained. The court seems to have entertained no doubt about the validity of the California statute similar to that of Virginia, but held that it had no application to the case under trial as the law of New York, or *lex loci contractus*, governed the parties in the interpretation of their contract.

In the light of this decision it appears that there is nothing in the objection made by opposing counsel that under our Virginia statute "the contract of shipment is entire, and, * * if this law is valid, we would have a law of Virginia which would control and regulate carriers in the most distant States."

That it is competent for a State to legislate touching the proof and authenticity of contracts made within its limits cannot be seriously questioned. Indeed, counsel for the appellant admit that State statutes relating to insurance policies and parol agreements are valid and constitutional because "the power to legislate on such matters has never been surrendered by the States."

We insist that the State has never parted with its right to legislate touching the formality and proof of contracts, no matter what they may relate to.

"The law of the place where the contract is entered into is to govern as to everything that concerns the proof and authenticity of the contract, and the faith which is due to it; that is to say, in all things which regard its solemnities and formalities. The law of the place of the contract is generally to govern in everything which forms the obligation of the contract, or what is called *vinculum obligationis;* the intrinsic and substantive form of the contract; * * * in questions whether the rights which arise from the nature and time of the contract are lawful or not, the law of the place of the contract is to govern." 3d Am. and Eng. Enc., 542; Story on Conflict of Laws, sec. 240.

This doctrine was distinctly recognized by this court in the case of *Pennoyer* vs. *Neff*, 95 U. S., 714, in which Mr. Justice Field delivering the opinion uses this language at page 722:

"The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, *the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced.*"

In the case of *Pennsylvania Railroad Company* vs. *McCann*, 42 N. E. Rep., 768, an action was brought by McCann against the Railroad Company for damages sustained in the

course of his duties as employee of said company upon the ground that his injuries resulted from defective appliances upon the train. The line of railroad upon which the plaintiff worked was operating between Youngstown in the State of Ohio to a point within the State of Pennsylvania where the accident occurred. The action was brought in the State of Ohio, and under a statute of that State it is provided that when defects are made to appear in the machinery or attachments of certain railroads, in actions for injuries to its employees, such defects shall be *prima facie* evidence of negligence on the part of the railroad. The defendant company objected that this rule of evidence as established by the statute had no application to the case at bar because the injury had been sustained beyond the limits of Ohio. But the court in an opinion delivered by Bradbury, J., overruled this objection. At page 769 the learned Judge uses this language:

"There can be no doubt respecting the general power of a State to prescribe the rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy, over which its legislative department necessarily has authority, limited only by the constitutional guarantees respecting due process of law, vested rights and the inviolability of contracts."

And referring to *Railroad Company* vs. *Mitchell* (Georgia), 18 S. E, Rep., 290, Judge Bradbury quotes as follows:

"Touching the evidence requisite to make a *prima facie* case in behalf of the plaintiff below, the court gave in charge to the jury the rule of law applicable in this State between the parties where the cause of action is against a railroad company for a personal injury sustained by one of its employees in consequence of the negligence of the company. * * * This was correct, although the injury sued for was sustained in the State of Alabama. The quality or degree of evidence requisite to sustain an action, or to change the burden of proof, is determined by the law of the forum, and not by the law of the place where the cause of action

arose. It belongs not to the law of rights, but to the law of remedy." The Court of Appeals of New York held in 1876, that "an act declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact is valid."

Howard vs. *Moot*, 64 N. Y., 262.

See also *People* vs. *Cannon*, 139 N. Y., 32 c. c; 36 Am. State Rep., 668.

In *Ogden* vs. *Saunders*, 12 Wheaton, 262, Mr. Justice Washington in the course of his opinion uses this language:

"The statute of frauds, and the statute of limitations, which have been put as examples of the third and fourth classes of laws, are also admitted to be valid, because they merely concern the modes of proceeding in the trial of causes. The former supplying *a rule of evidence*, and the latter forming a part of the remedy given by the legislature to enforce the obligation, and likewise providing *a rule of evidence*. All this I admit."

And Mr. Chief Justice Marshall in his opinion at pages 349–50 shows that a State legislature has full power to prescribe any formalities necessary to the obligation of contracts between its citizens. He instances the statute of frauds, acts against usury and statutes of limitations as illustrating this rule, and then adds:

"In prescribing the evidence which shall be received in its courts and the effect of that evidence, the State is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and mode of proceedings in its courts."

The Chief Justice makes an important distinction at this point also, which counsel for the appellant in this case seem to have entirely diregarded. He says:

"The obligation must exist before it can be impaired; and a prohibition to impair it when made, does not imply an inability to prescribe those circumstances which shall create its obligation."

So we insist that there can be no regulation of bills of lading, as instruments of inter-state commerce, until the contract of shipment exists; it does not exist until agreed to by both parties; and the statute of Virginia only prescribes regulations which must precede the obligation of the contract; and it is therefore clearly not within the prohibition of the constitutional provision touching inter-state commerce.

Counsel for the appellant contend, however, that the practical effect of the legislation in this case is to impose a liability or penalty upon the initial carrier unless the contract is in writing and signed by the shipper. The answer to this is plain. Counsel for the appellant admit, and indeed insist, that the parties have a right to make such a contract as to their mutual liability as they may see fit. If so, then the carrier has a right to assume any amount of liability, regardless of what the common law would impose, and in the absence of legal proof to the contrary it is no greater hardship on the carrier to assume that it undertook to convey the property safely to its destination than it would be upon the shipper to assume that he took all the risk of safe carriage. Indeed, it is much more consonant with reason and justice that the presumption should be against the carrier rather than the shipper.

The consignor cannot be supposed to know in the case of a continuous line who are the owners of its different portions, and if compelled to seek out the negligent carrier he would find his task often difficult and sometimes impossible. He could hope for but little aid from the associated carriers, and might be obliged to assert his claim for compensation, in case of loss, against a distant party among strangers, under circumstances such as would discourage a prudent man from pursuing his legal remedy at all. Such a rule is obviously an impediment to and a burden upon commerce. The construction should be that the first carrier is the re-

sponsible party, and the intermediate roads his agents. Carriers possess facilities for tracing lost packages which the consignor does not have and cannot obtain; and they may without injustice or inconvenience charge the loss to the agent responsible for the negligence.

2 Am. and Eng. Enc. of Law, p. 860.
1 Woods' Rep., 186-7.

This is the English rule adopted with modification by our revisers, and we submit that the section under examination is in aid of commerce between the States, promoting its freedom, rather than operating to check or interfere with the same.

Bogg vs. *Wilmington Railroad Company*, 109 N. C., 279; s. c. 26 Am. St. R., 569.

Counsel for appellant refers to the case of *Railroad Company* vs. *Manufacturing Company*, 16 Wallace 324, where Mr. Justice Davis recognized the American rule restricting the liability of the initial carrier to its own line; but they failed to give proper emphasis to an important qualification of the statement as made by this court, viz: that such rule was only applicable "*in the absence of any special contract.*" So that the question again recurs, what in fact is the contract between the parties, and by what rule of evidence are the terms of such contract to be ascertained? As was said by this court in *New Jersey Steam Navigation Company* vs. *Merchants Bank*, 6 Howard, 383, where the carrier claimed exemption from liability under its bill of lading and published notice:

"But admitting the right thus to restrict his obligation, it by no means follows that he can do so *by any act of his own.* He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is

not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court in the case of *Hollister* vs. *Nowlen*, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification.

"The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

We respectfully submit that so far from the statute in question operating as a burden upon, or an impediment of the the freedom of inter-state commerce, its purpose and tendency are just the reverse, since it relieves a shipper of the difficult and vexatious obligation to follow up his merchandise through all its meanderings, except where he distinctly undertakes this duty.

If permitted to go outside the printed record in this cause, as counsel for the appellant have so freely done, we might state the fact that the appellee, in accepting the through bill of lading from Richmond, Va., to Bayou Sara, La., did not know, and had no means of knowing, over what connecting lines or at what risk the goods would travel before reaching their destination. Certainly the appellee had no idea that there would be any water risk, or they would have taken out marine insurance according to their custom. If this property had gone overland throughout the line of transportation, as appellee supposed it would, this case could not have been here for adjudication. And no better illustration could be

adduced of the hardship of the American rule which the Virginia Legislature designed to modify.

Counsel for the appellant have seen fit to testify at some length in their brief as to the rules and rates of carriers. We cannot follow them into these intricate and technical questions, and submit that it is wholly improper to consider them now, as they did not make these things a matter of record in the usual way. But we fail to catch the force of their argument, that the Virginia statute operates indirectly to regulate the compensation of the carrier of inter-state business. The liability for safe carriage rests *somewhere*, in any event, and in giving a through bill of lading at through rates, the question of risks is considered in making the rate. The English rule, and the statute of Virginia, in the absence of a special contract evidenced in the manner prescribed, simply treats the initial carrier as having assumed the liability as between it and the shipper for the entire route, and in case the loss occurs on some connecting line, its redress is over against the party in whose hands the loss occurred. We repeat, then, that the element of risk is the same under the statute as without the statute, the question relating only to primary liability.

Counsel for the appellant also volunteers the information that there is a difference in practice between the shipment of live stock, where bills of lading are signed by the shipper (*Hart* vs. *Pennsylvaaia Railroad Company*, 112 U. S., 331,) and the shipment of other classes of property where, they say, bills of lading are not signed by the shipper, and cannot be so signed without operating as a great hardship upon the parties; and they assign as a reason that the shipper of live stock, or his agent, can read and write, while the shipper of other classes of goods, or his agent, cannot read and write. This strikes us as being a most remarkable proposition. Why the cattle raiser or his cow-boy should be supposed to possess higher educational qualifications than a manufacturer

of tobacco, or his agent, we are unable to concieve. Besides, counsel for appellant must know that many people sign contracts without being able to read or write, by making their mark before some witness; and we submit that even if there were anything in the distinction which counsel seek to make between persons handling live stock and persons handling other kinds of property, it would be no argument whatever against the statute under examination. It could hardly be contended for a moment that the statute of frauds is any great hardship because an illiterate man is unable to sign his name. There is no exception made by the statute in favor of such person, and we doubt whether such a claim was ever set up in any court.

Counsel for the appellant undertake to show that if the several States are allowed to legislate upon this subject as Virginia has done "there may be as many different and conflicting provisions as there are States, thus leading to an interminable confusion and embarrassment." (Appellant's brief at page 19.) And again they say, illustrating this proposition, "either the consignor in Virginia or the consignee in Louisiana can sue for the loss of these goods. Virginia has seen fit to say to the carrier, you shall be liable unless you make your contract in a different way. Under such circumstances how could the rights of the parties to this contract be properly determined?" In answer to this question we would again remind the learned counsel of the doctrine of *lex loci contractus*, which is the law, and the only law governing the parties.

In *Liverpool Steam Co.* vs. *Phœnix Insurance Co.*, 129 U. S., page 397, Mr. Justice Gray, delivering the opinion of the court, says at page 397:

"This court has not heretofore had occasion to consider by what law contracts like these now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity and

their interpretation, by the law of the place where they were made unless the contracting parties clearly appear to have some other law in view."

That was a case where a contract of affreightment was made in New York by an American shipper with an English Steamboat Co. doing business there for the shipment of goods at that point for through carriage and delivery at Liverpool, and the question was whether the American or the English rule governing such contracts was applicable. This court held, after great consideration and an elaborate review of all the authorities, that the law of the place of shipment controlled the parties. Further on in the opinion at page 458 this court uses the following language:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

And again on page 459 of the same case we find this language:

"The contract being made in New York, the ship-owner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of goods, is one continuous act to begin in the port of New York to be chiefly performed on the high seas, and to end at the port of Liverpool."

It appears, therefore, that if the *lex loci contractus* is to govern in any action upon the contract between the parties,

there is no possible danger of the "interminable confusion and embarrassment" apprehended by counsel for the appellant resulting from conflicting legislation between the various States. See also *The Henry B. Hyde*, 82 Fed. Rep., *supra*.

There is no possible analogy between the legislation of Virginia in question and that of Indiana in respect to the delivery of telegraph messages which came before this court in the case of *Western Union Telegraph Company* vs. *Pendleton*, 122 U. S., 347. The inevitable tendency to conflict and confusion in that case is obvious, as pointed out by Mr. Justice Field in his opinion at pages 258-9.

The authorities relied on by counsel for appellant are easily disposed of. We submit that they have no bearing upon the question at issue.

In *Louisville, &c., Railroad Company* vs. *Railroad Commissioners of Tennessee*, 19 Fed. Rep., 679, an act creating the Railroad Commission was declared invalid, (1) because it was *too indefinite;* and (2), because it violated the *Fourteenth Amendment* to the United States Constitution by discriminating against railroad corporations, which are *persons*.

In *Almy* vs. *California*, 24 Howard, 169, an act imposing a stamp tax on bills of lading for the transportation of gold, &c., out of California, was held repugnant to that clause of the Federal Constitution forbidding any State to lay a *tax on exports*.

In *Railroad Company* vs. *Husen*, 95 U. S., 465, a statute of Missouri prohibited the driving of cattle through that State, whether diseased or not, and this court held that the Legislature could not thus interfere with transportation into and through said State.

In *Walton* vs. *Missouri*, 91 U. S., 275, another statute of Missouri came under review which undertook to impose *a*

license tax on peddlers selling merchandise from outside the State, but this court held that a license tax required for the sale of goods is in effect a *tax upon the goods themselves*.

But see *In Re May*, 82 Fed. Rep., 422.
Machine Company vs. *Gage*, 100 U. S., 676.

In *Mobile* vs. *Kimball*, 102 U. S., 691, a statute of Alabama establishing a Board of Commissioners to improve the harbor came before this court and was sustained, upon the ground that said act dealt with matters local in their nature and intended to aid rather than interfere with inter-state commerce.

In *Brown* vs. *Houston*, 114 U. S. 622, coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania was taxed under the Louisiana statute, which was assailed as unconstitutional among other reasons, because obnoxious to the commerce clause of the Federal Constitution; but this court pronounced said statute valid, affirming the judgment of the State court.

In *Bowman* vs. *Railway Company*, 125 U. S., 465, a statute of Iowa forbidding common carriers to bring intoxicating liquors into that State except under certain rigid restrictions was declared unconstitutional by this court, three judges dissenting and one being absent.

In the court below counsel for the appellant here put their main reliance upon the case of *Norfolk & Western Railway Company* vs. *Commonwealth*, 88 Va., 95. This was a decision construing the statute of Virginia governing the running of railroad trains on Sunday, the Court of Appeals of Virginia having decided in said case that such act was unconstitutional. That case, however, has since been overruled by the decision in *Norfolk & Western Railway Company* vs. *Commonwealth*, 93 Va., 749, and this latter view was announced

about the same time by this court in *Hennington* vs. *State of Georgia*, — U. S.

Counsel undertake to fortify their attack upon the first clause of section 1295, under which we claim, by insisting that the second clause of said section is unreasonable, etc. We need only remark that upon well-established principles, even if the latter were open to constitutional objection, this part might be declared void without setting aside what is free from such objection, since they are not at all dependent upon one another. But we suppose the court will hardly undertake to pass upon the validity of this statute further than may be necessary to decide the case now before it.

Respectfully submitted,

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